Group Legal Services Association
Solo, Small Firm, and General Practice Section
2014 Annual Conference
May 1-3, 2014, Las Vegas, Nevada

ERISA Update

Friday, May 2

Part 1
10:20 am-11:20 am

Part 2
11:30 am-12:30 pm

Presenter: **Clifford R. Rhodes; Murphy, Hesse, Toomey & Lehane, LLP**

Materials Created By: **Katherine A. Hesse; Murphy, Hesse, Toomey & Lehane, LLP**

Clifford Rhodes

Mr. Rhodes received his bachelor's degree from the University of Iowa where he was a University Honors Scholar. In 1992, Mr. Rhodes received his. J.D. from the University of Iowa, College of Law graduating with distinction, and serving as a member of the Iowa Law Review. Mr. Rhodes served as an Assistant Utah Attorney General, where he received the State of Utah Award for outstanding service. He has also served as a prosecutor and most recently served as counsel for the Cambridge Health Alliance and has appeared extensively before the EEOC, the MCAD, and the UADD (Utah's equivalent to MCAD), as well as before state and federal courts in Utah and Massachusetts. In addition, Mr. Rhodes has testified and argued before legislative subcommittees on labor and employment issues. Mr. Rhodes concentrates in litigation, labor and employment benefits law with both private and public sector clients.

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About the Presenter

Katherine A. Hesse is a founding partner of Murphy, Hesse, Toomey & Lehane, LLP, a multi-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts.

Ms. Hesse practices primarily in labor and employment and employee benefits law. She serves as counsel to business, government, and not-for-profit entities including hospitals, colleges and private and public retirement and welfare plans. She counsels

clients on a daily basis on employment and benefits issues and has litigated numerous employment and benefits cases before the state and federal trial and appellate courts, administrative agencies and arbitrators. Ms. Hesse is also an active practitioner in a variety of forms of alternative dispute resolution including mediation, conciliation, fact finding and several forms of arbitration.

Ms. Hesse sits on the Board of the International Foundation of Employee Benefit Plans, chairs its Government Liaison Committee, and formerly chaired its Attorneys Committee. She also served as president of the International Society of Certified Employee Benefit Specialists. She sits on the editorial board of Benefits Quarterly, the Pension Editorial Advisory Board for Wolters Kluwer (which houses brands such as Aspen Publishing and CCH), and formerly wrote the legal column for Aspen Publishers, Inc. Managing Employee Health Benefits. Ms. Hesse speaks frequently on employment and benefits issues.

A graduate of Smith College and Boston University School of Law, Ms. Hesse is admitted to the federal and state trial and appellate bars in Massachusetts and the District of Columbia and the Supreme Court of the United States. Ms. Hesse has received a number of awards for her professional service and for her charitable commitments including the 1997 recipient of the prestigious Cushing-Gavin Award for excellence in providing legal counsel.

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ERISA UPDATE, Part 1:
The FMLA After 20 Years: A Look Back, The DOMA Decision and Agency Reaction, and FMLA/ADA And Other Selected Cases

Prepared by

Katherine A. Hesse

May 2,2014

GLSA, GPSolo and ABA Standing Committee on Group and Prepaid Legal Services
Aria Resort and Casino, Las Vegas, Nevada

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Outline

- 20th Anniversary of Passage of the FMLA
- U.S. Supreme Court's *Windsor* Decision on DOMA
  - Effect on FMLA, Employee Benefits
- FMLA Selected Cases
- ADA Selected Cases
- FMLA/ADA Intersection
- Other Selected Cases
- Guidelines for Avoiding Litigation

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The FMLA Celebrated its 20th Anniversary in February 2013

The 20th anniversary of FMLA was marked by the DOL with

- the release of a study of key survey findings about the FMLA, and
- the issuance of a final rule implementing two expansions of FMLA protections for military families and for airline flight crews.

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Key Findings in the Study

- Nearly 60% of employees meet FMLA criteria for coverage and eligibility.
- 13% of all employees reported taking leave for an FMLA reason in the past 12 months, with 90% of workers returning to their employer after FMLA leave.
- 91% of employers reported FMLA had no noticeable effect or a positive effect on business operations (employee absenteeism, turnover, and morale).

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Key Findings in the Study

- 85% of employers report that complying with the FMLA is very easy, somewhat easy, or has no noticeable effect.
- 24% of leave is intermittent leave. Fewer than 2% of employees who take intermittent leave are off for a day or less.
- Fewer than 2% of covered worksites reported confirmed misuse of FMLA.
- Fewer than 3% of covered worksites reported suspicion of FMLA misuse.

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U.S. Supreme Court DOMA Decision: Background

- Passed in 1996, section 3 of DOMA provided that, for purposes of all federal laws, the word ‘marriage’ is restricted to “a legal union between one man and one woman, as husband and wife” and the word ‘spouse’ refers “only to a person of the opposite sex who is a husband or a wife.”
- DOMA allowed employers to treat same-sex marriages differently than opposite-sex marriages, even where same-sex marriage was recognized under state law, for purposes of providing spousal benefits under federal law such as ERISA, COBRA and FMLA.

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U.S. Supreme Court DOMA Decision

United States v. Windsor, 133 S. Ct. 2675 (2013).

- Writing for a 5-4 Majority, Justice Anthony Kennedy in Windsor explained that section 3 of DOMA violated the 5th Amendment of the United States Constitution by denying "equal liberty" to same-sex couples lawfully married under state law.

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U.S. Supreme Court DOMA Decision

- The Court did not overturn section 2 of DOMA which leaves it up to each state whether to recognize same-sex marriages from other jurisdictions.
- The Court did not find a fundamental, constitutional right to marriage.
- Accordingly, the decision whether to recognize same-sex marriages is still left to each state.

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U.S. Supreme Court DOMA Decision: Effect on FMLA

- Under the FMLA, a "spouse" is defined as "a husband or wife as defined or recognized under State law for purposes of marriage **in the State where the employee resides**, including common law marriage in States where it is recognized." (Emphasis added)
- Post-*Windsor*, FMLA rights extend to same-sex spouses based on the state of the employee's residency, not the state in which the employee works.
- On August 9, 2013, the DOL issued guidance implementing the *Windsor* decision.

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U.S. Supreme Court DOMA Decision: Effect on FMLA

An employee in a same-sex marriage who was married and resides in a state that allows same-sex marriage

- is entitled to take FMLA leave to care for the employee's same-sex spouse with a serious health condition
- is entitled to take FMLA leave to deal with obligations (including child care and related activities) arising from a same-sex spouse being on, or called to, active duty in the military; and
- would be entitled to the 26 week caregiver leave for his or her same sex military spouse who is seriously inured or ill.

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U.S. Supreme Court DOMA Decision: Effect on FMLA

- Same-sex spouses who reside in states that do not recognize same-sex marriage, would not appear to be entitled under current FMLA definitions to FMLA spousal benefits.
  - Employers, however, may decide to extend such benefits to employees residing in such states.

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DOMA Decision: Effect On Other Federal Agencies

- Other federal agencies also moved to make changes as necessary post-*Windsor*.
  - Treasury and IRS announced that legally married same-sex couples will be treated as married for federal tax purposes and have issued other guidance.
  - The Social Security Administration is processing and paying spousal retirement claims for same-sex marriages.

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DOMA Decision: Effect On Other Federal Agencies

DOL's EBSA issued Technical Release 2013-04 provides

- "Spouse" includes anyone legally married in a state that recognizes such marriages regardless of whether the state of domicile recognizes the marriage.
- "Marriage" includes same sex marriages legally recognized as a marriage under any state law.
- Neither term includes relationships under state law *e.g.*.:
  - Domestic Partnerships
  - Civil Unions

This is so regardless of whether the individuals are of the same or different sexes.

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DOMA Decision: Effect On Other Federal Agencies

- Except for the FMLA, federal agencies appear to be using a **state of celebration** approach, rather than a state of residency approach, thus assuring "legally married same-sex couples that they can move freely throughout the country knowing that their federal filing status will not change."

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DOMA Decision: Issues To Consider – Leave Designation

- Designation of leave as FMLA leave.
  - Employer designates leave as FMLA leave to care for a same-sex spouse for an employee who resides in a state that does not recognize same-sex marriage.
  - Query whether the designation will be effective? Likely not, thus this employee could arguably be eligible for more than the 12 weeks.
  - Would such a designation run afoul of the FMLA? Or could it be considered interference with FMLA protected rights?

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DOMA Decision : Issues to Consider – Confirming Status

- Confirmation of Same-Sex Marriages
  - Is asking for documentation of the marriage is permissible?
  - What if documentation is not required in heterosexual marriages?

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In Loco Parentis

- Note that under FMLA regulations, even before the *Windsor* decision, an employee in a same-sex marriage who stood "*in loco parentis*" to a child was entitled to leave for such a "son or daughter" as defined.
- The employee is considered to be standing *in loco parentis* when s/he has day-to-day responsibilities to care for and financially support the child.

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DOMA Decision: Other Areas In Which *Windsor* May Have An Effect:

- Retirement Plans – selected issues:
  - Joint and survivor annuities – must now be provided to qualifying same-sex spouses absent consent.
  - Minimum required distributions – same-sex spouse of a deceased participant will be permitted to delay distribution of the participant's benefit from the plan until the participant would have attained age 70 1/2 instead of the previous quicker timeframe.

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DOMA Decision: Other Areas In Which Windsor May Have An Effect:

- Hardship withdrawals – Same-sex spousal medical expenses, tuition costs and funeral expenses can now qualify, whereas before the same-sex spouse had to be designated as "primary beneficiary" to qualify.
- QDROs – Divorcing same-sex spouses can now file to receive a portion of their former spouse's benefit by using the QDRO process.
- Rollovers – Same-sex spouses may now rollover deceased participant's benefit to the spouse's IRA or qualified plan.

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DOMA Decision: Other Areas In Which Windsor May Have An Effect:

- Health Plans – Selected issues
  - Imputed Income – Group health coverage costs for qualifying same-sex spouses will no longer be subject to income or payroll taxes; corresponding elimination of employer duty to report/withhold.
  - COBRA continuation coverage and notices – "Qualifying beneficiary" encompasses a qualifying same-sex spouse.

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DOMA Decision: Other Areas In Which Windsor May Have An Effect:

- HIPPA - mid-year enrollment election rights if the same-sex spouse loses coverage under another plan.
- FSA, HRAs, and HSAs –Qualifying medical expenses incurred by the same-sex spouse of an employee may now be eligible for tax free reimbursement.

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DOMA Decision: **Action Items** For Employers and Plan Sponsors

- Employers already providing benefits for same-sex couples will want to review their tax-reporting processes.
- Multi-state employers may wish to consider whether to extend spousal leave benefits to employees in same-sex marriages who live in states that do not recognize same-sex marriage.
- Consider whether to make any changes if employer already provides for benefits for domestic partners/civil unions.

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DOMA Decision: Action Items, cont'd.

- Review and update FMLA policies, benefit plans, and related procedures and forms and train supervisors on the changes.
- Communicate changes to employees in a timely and clear fashion.
- Coordinate with outside vendors to ensure smooth and consistent administration of changes.

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FMLA: Private and Public Enforcement Continues

- Enforcement continues by DOL, *e.g.*, DOL reported FMLA violations and compliance corrections at T.G.I. Fridays, including
  - Failing to reinstate timely to the same or equivalent position
  - Notification and policies not updated or misstated.

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FMLA: Pre-Eligibility Requests for Post-Eligibility Leave

Practice Tip: an employee’s pre-eligibility request for post-eligibility leave is protected by the FMLA

- Morkoetter v. Sonoco Products, Co., 2013 WL 1332252 (N.D.Ind. 2013).
  - An employee who had not been employed for the statutory amount of time advised his employer that he would need to take FMLA leave once he was eligible.
  - The employee was terminated before he became eligible.
  - The court found this was retaliation under the FMLA because the employer used “an employee’s reliance on the FMLA as a ‘negative factor in promotion, termination, and other employment decisions.’”

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FMLA: Employer Burden to Prove Ineligibility

Practice Tip: Where the employer does not record hours worked, it will bear the burden of proving employee's ineligibility for FMLA.

- In Donnelly v. Greenburgh Central School District, No. 7 et al., 691 F.3d 134 (2nd Cir. 2012), school district denied teacher FMLA because she failed (by 3 hours) to work 1,250 hours because 12 months prior to requested leave. School district based this on a calculation of the amount of time each teacher is contractually bound to work each day multiplied by the number of days the teacher worked.
- Teacher claimed she had worked from home and met eligibility requirements. Because school district was unable to show hours actually worked by teacher, she was found to be FMLA eligible.

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FMLA: Notice Of Leave May Be Informal

Practice Tip: An employee should notify his/her employer that he/she requires leave for a FMLA qualified event, but such notice need not be formal or even use the words "FMLA".

In Wiseman v. Awerys Bakeries, LLC, 2013 WL 2233886 (6th Cir. 2013), the court found that an employee saying to his employer that he "was injured" and "could not work" due to his back injury, coupled with his employer's knowledge of his susceptibility to serious back pain and injury, multiple doctors' notes, and multiple requests to speak to the company's doctor, put the employer on sufficient notice for FMLA leave.

NOTICE NEED NOT BE EXPLICIT. IT CAN BE CONSTRUCTIVE.

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FMLA: But Employer Needn't be a Mind Reader

Lanier v. Univ. of Texas SW Med. Ctr., 527 Fed. Appx. 312 (5th Cir. 2013)

- The Plaintiff was a business analyst who, as part of her job, was required to take part in rotating on-call duty, consisting of 24-hour on-call coverage support, assigned about once every twelve (12) weeks.
- While Plaintiff was on call, she sent her supervisor a text message that she would be unable to work that evening because her father was ill.

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FMLA: But Employer Needn’t be a Mind Reader, cont’d.

- The Plaintiff then became unresponsive to phone calls and, when she was confronted about this by her supervisor, turned in her work equipment without explanation.
- Plaintiff claimed that her text message, coupled with the fact that her supervisor “should have known” that her father was elderly and that, therefore, she would need FMLA leave, was sufficient notice to assert her FMLA rights.

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FMLA: But Employer Needn't be a Mind Reader, cont'd.

- The Court disagreed with the Plaintiff, finding that an employer is not required to be "clairvoyant" regarding employees' FMLA needs.
- Takeaway – While employees need not use the specific words "FMLA leave" when providing such a request, they need to provide sufficient notice to the employer to make it aware of their needs for qualified leave.

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FMLA: Serious Health Condition

Pivac v. Component Services & Logistics, Inc., 2013 WL 1104750 (M.D.Fla. 2013):

- Employee charged employer with FMLA interference and retaliation.
- The employer disputed whether employee had a qualifying "serious health condition."
- Employee's evidence consisted of her testimony that she felt overworked and wanted time off, first to visit her parents, but then just because she was crying and sad. She went to a doctor who provided her with no treatment, no referrals, no medicine, and no further appointments.

The employee's own conclusory statements that she suffered from depression and anxiety was not sufficient to establish "serious health condition."

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FMLA: Requiring Work During FMLA

Vess v. Scott Medical Corp., 2013 WL 1100068 (N.D.Ohio 2013):

- As part of her interference claim, the employee stated that while she was on leave, her employer asked her to make and respond to phone calls about scheduling, her job responsibilities, list of duties, staff evaluations, and complete educational competencies.
- Court held that while FMLA leave cannot be conditioned "upon the willingness of the employee to remain 'on call' to the employer," "fielding occasional calls about one's job while on leave is a professional courtesy that does not abrogate or interfere with an employee's exercise of FMLA leave."

Calls regarding job responsibilities were permissible; allegedly requiring she complete educational competencies before returning to work, complete evaluations of RTs, and enter blood gas data was not.

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FMLA: Follow the Regulations on When Certification Can Be Requested

Arrango v. Work & Well, Inc., 2013 WL 1093206 (N.D.Ill. 2013):

- Employee charged his employer with FMLA interference.
- Employer, based on recommendations from his insurance consultant, allowed employees only 4 weeks of FMLA leave upon receipt of medical information certification.
- To obtain the balance of 12 weeks of FMLA leave, the employees were required to provide additional medical documentation at the end of the first 4 weeks.

Court found that this two-step certification process was not a permissible request.

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FMLA Retaliation: Timing is Everything

- If employer considers employee's exercise of FMLA rights or use of FMLA leave when making employment decisions, employer may be liable for retaliation claims.
- Courts can infer retaliation when there is a close temporal proximity between the FMLA leave (or notice of intent to take leave) and the employment decision.

Brown v. ScriptPro, LLC, 700 F.3d 1222 (10th Cir. 2012):

- Employee made a request to take time off and work from home two days before he was terminated.
- Despite temporal proximity, court found employer did not possess retaliatory intent where there was a well-documented history of dissatisfaction with employee's work.

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No FMLA Retaliation Where Employer Proved Same Action Would Be Taken

Lineberry v. Richards, 2013 WL 438689 (E.D.Mich. 2013):

- Employee took FMLA leave for lower back and leg pain with medical documentation stating that she could not stand for more than 15 minutes, could not push or pull more than 20 pounds, and could not lift more than 5-10 pounds.
- While on FMLA leave, co-workers saw pictures she posted to her Facebook account showing her on a pre-planned vacation to Mexico holding her grandchildren, standing in long lines, riding a horse, and other activities that would seem to be medically prohibited.

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No FMLA Retaliation Where Employer Proved Same Action Would Be Taken, cont'd.

- Employer confronted the employee about the pictures and her medical limitations.
- Employee lied about the circumstances surrounding the pictures, but later admitted that she was lying.
- Employer terminated her for dishonesty, a termination that was upheld by the court.

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No FMLA Retaliation Where Employee's Actions Were Dishonest

Dietrich v. Susquehanna Valley Surgery Center, 2013 WL 433312 (M.D.Pa. 2013):

- Employee claimed that he was terminated for using his FMLA leave and because he had a stated disability – hemophilia.
- Employer, claimed that termination was based on the fact that the Employee was seen conducting his private landscaping business while on FMLA leave from the employer.
- Court held that employee's behavior could be reasonably seen as dishonest and worthy of discipline, including termination.

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Fraudulent Use of FMLA Was Grounds for Termination

Durden v. Ohio Bell Telephone Co., 2013 WL 1352620 (N.D.Ohio 2013):

- Employee claimed that she experienced discrimination and a hostile work environment because she decided to convert to Islam.
- Employer argued that she was terminated because she used FMLA leave fraudulently to obtain a marriage license.
- The court found that fraudulent use of FMLA was sufficient basis for termination, despite claims of discrimination.

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FMLA Employer Needn't Hold Job Open Indefinitely

Henry v. United Bank, 686 F.3d 50 (1st Cir. 2012):

- Employee brought an action against her employer alleging retaliation as she had been terminated following the expiration of her FMLA leave.
- The court dismissed her claim, finding that the employer had terminated the employee for reasons independent of her decision to take FMLA leave.
- Specifically, the employee only provided the employer with a doctor's note that she could not return to work "until further notice."
- The court found that the employer did not violate the FMLA when it terminated her shortly after the end of her FMLA leave.

But … What about ADA?

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ADA: Americans With Disabilities Act

- The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against a qualified individual with a disability in the workplace.
- It also requires reasonable accommodation for QIWDs, unless it would cause employer undue hardship.
- An employer is required to engage in an "interactive process" with a QIWD as to reasonable accommodations for his/her disabilities, which can include job-protected leave.

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ADA: Essential Functions/Job Descriptions

Jones v. Walgreen Co., et al, 679 F.3d 9 (1st Cir. 2012)

- Employee brought an action against her employer for disability discrimination in violation of the ADA and state law
- In determining essential job functions, the court looked at:
  - Employer's judgment as to which functions are essential;
  - **Written job descriptions prepared before advertising or interviewing applicants for the job**;
  - The current work experience of incumbents in similar jobs.

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ADA: Essential Functions/Undue Hardship

McMillan v. City of New York, 711 F.3d 120 (2nd Cir. 2013):

- The Plaintiff had diagnosed schizophrenia which made it difficult for him to get to work at 10:15AM.
- The District Court found that, as a matter of law, timely arrival is an essential job function.
- The Appeals Court disagreed, finding that, while a timely arrival is normally an essential function, there still must be a fact specific inquiry as to whether it is an essential function in a particular case.

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ADA: Essential Functions/Undue Hardship

- Working through lunch, and working late to “bank” time and apply that “banked” time to future late arrivals was found by the District Court to be an undue hardship because the relevant CBA required advance approval to work through lunch.
- The 2d Circuit disagreed, finding pre-approval is not a significant difficulty or expense for an employer.
- Takeaways – Determinations of essential function must be made on a case-by-case basis. Additionally, procedural impediments to requested accommodations will not generally constitute an undue hardship.

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ADA: Transfer As Accommodation

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012):

- United Airlines had a policy that disabled individuals may be transferred to an equivalent or lower-level position if they were unable to complete the duties of their current position.
- Such individuals, were not guaranteed placement in vacant positions, but rather were only given preferential treatment in the competitive process for the position.

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ADA: Essential Functions

- The district court had found that the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question."
- The 7th Circuit overturned this decision, finding that a reasonable accommodation may require the employer to provide individuals with disabilities with "reassignment to a vacant position" even when the employee is not the most qualified applicant.

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FMLA and ADA: Size Matters

- FMLA – 50 or more employees for each working days for 20 or more calendar workweeks
- ADA – 15 or more for each working day for 20 or more calendar weeks
- State Law/Local Ordinances – vary by locale

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FMLA and ADA: Length of Leave

- FMLA - 12 work weeks of leave per leave year
- ADA and c. 151B - reasonable accommodation, which may include an indeterminate amount of leave, barring undue hardship
- State Law/Local Ordinances – vary by locale

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FMLA and ADA: Service Requirements

- Unlike the FMLA, the ADA does not have service requirements for eligibility.
- In general, employees are eligible for FMLA leave if they have worked for their employer
  - at least 12 months,
  - at least 1,250 hours over the past 12 months, and
  - work at a location where the company employs 50 or more employees within 75 miles.

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FMLA and ADA: Service Requirements, con't.

- ADA applies to all employees, regardless of tenure or employment status or hours worked
- ADA applies immediately upon hire
- ADA covers job applicants, and applies during the application and interview process

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FMLA and ADA: Serious Health Condition vs Disability

- FMLA - Serious Health Condition
  - Illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider
- ADA – Disability
  - A physical or mental impairment that substantially limits one or more major life activities
- Don’t forget state laws and local ordinances

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FMLA and ADA: The Interactive Process

- The employer's obligation to consider a reasonable accommodation under the ADA and state law, and to engage in an interactive process, is independent of the FMLA.
- The obligation exists even where employee is not eligible for FMLA leave, and even after 12 weeks of FMLA leave have been granted and exhausted.
- Employer's obligation to engage in the interactive process and to consider additional leave as a reasonable accommodation is ongoing, and must be evaluated each time an employee exhausts his/her allotted period of leave (barring a situation where repeated requests become indeterminate).

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FMLA and ADA: INTERSECTION

EEOC v. Interstate Distributor Co. 2012 WL 6852834 (D.Colo. 2012):

- $4.85 million dollar settlement based on a trucking company's leave policy
- The company had a policy in which employees were automatically terminated after exhausting their 12 weeks of FMLA leave and failing to return to work.
- While this policy satisfied the requirements of the FMLA, it violated the terms of the ADA.
- Granting 12 weeks under the FMLA (and not considering additional leave) is not sufficient for ADA compliance.

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Hypothetical

- An employee approaches his employer to tell her that he is going to begin receiving treatment for cancer and needs to take 12 weeks of leave. At the expiration of his leave, the employee produces medical certification that he needs an additional three weeks of leave to recover. The employer employs 25 people.

- What, if any, obligation does the employer have to consider the request for additional leave?

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Hypothetical - Answer

- Since the employer only employs 25 people, it is not a covered employer for the purposes of the FMLA and is not required to provide FMLA leave or an extension of paid leave…..

But

- The employer would still be required by ADA and likely also state law to engage in the interactive process to determine whether a reasonable accommodation was available.

- Moral of the Story: Even though the FMLA may not apply, the ADA may.

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Remember The Guiding Principles: The D's

- **D's to Remember:**
  - Dignity
  - Discretion
  - Diversity
  - Disclosure
  - Due Diligence
  - Due Process
  - Documentation
- **D's to Avoid:**
  - Delay
  - Discrimination
  - Deceit

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Other Recent Cases: Focus on Discretion and Disclosure

- Discretion - Scibelli
- Disclosure/Loose Lips - Withrow, Kludka, Kough and Mullins

Don't forget about Cigna!

- A look to the future: Supreme Court Hears First Stock-Drop Case and focuses on "inside information".

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Discretion

Retain Discretion, But Exercise It Consistently!

"But I do exercise. I exercise discretion."

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Discretion

Scibelli v. Prudential, (1st Cir. 2012), is an example of the danger in not having discretionary language in your plan.

- The plan did not reserve to the administrator discretion to make disability interpretations.
- The court reviewed the administrator's decision *de novo*.
- Employee had two attending physician statements as to his disability; the LTD administrator had no contrary evidence.
- 1st Circuit reversed the plan administrator and the district court; found that plan abused its discretion in "denying" the disability determination.

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Disclosure/Loose Lips Sink Ships

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Disclosure/Loose Lips

- Withrow v. Bachy Halsey Plan, 2011 WL 3672778 (9th Cir. 2011). Wishy-washy responses to claim for benefits did not begin the accrual period for statute of limitations on appeal of benefits denial.
- Kludka v. Qwest Disability Plan, 454 Fed. Appx. 611 (9th Cir. 10/21/11). Plan denial of LTD benefits, upheld by the district court, was reversed and remanded. Claim denial from the Plan had failed to explain specifically what information was needed to perfect the claim and why that information was needed. Plan also failed to request SSA records even though it knew participant was receiving Social Security benefits and failed to explain why its determination differed.

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Disclosure/Loose Lips

- Kough v. Teamsters Local 301 Pension Plan, 437 Fed. Appx 483, 51 EBC 2639, 2011 WL 3626689, (7th Cir. 2011). Shows that where benefit denial letter was cursory, it failed to comply with claims regulations and remand necessary.
- Mullins v. AT&T Corp., 2011 U.S. App. LEXIS 9271, WL 1491223 (4th Cir. 2011). Shows that a sponsor can be hit with large penalty for failure to provide documents even when underlying claim dismissed.

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And Don't Forget Cigna v Amara!

- In 2011, the United States Supreme Court in Cigna v. Amara, 131 S.Ct. 1866 (2011). highlighted the importance of careful, timely and accurate communication and the avoidance of misleading statements.
- Cigna had converted its DB pension plan to a cash balance plan
- 25,000 employee class action was filed claiming that the notice of the filing was deficient.

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Cigna v Amara

- District Court found that Cigna's descriptions were significantly incomplete and misleading, e.g., co. newsletter said the new plan would:
  - "significantly enhance" the "retirement program".
  - Produce an overall improvement in …retirement benefits; and
  - Provide the "same benefit security" with "steadier benefit growth".

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Cigna v Amara

- Employees were also told that
  - They would "see the growth in (their) total retirement benefits" every year
  - That Cigna's initial deposit "represent(ed) the full value of the benefit (they) earned for service before 1998" and
  - "(o)ne advantage the company will not get from the retirement program change is cost savings"

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Cigna v Amara

- The new plan saved the company $10 million annually.
- The plan made a significant number of employees worse off:
  - The old plan had permitted early retirement at age 55.
  - The new plan imposed a pre-retirement mortality charge
  - The new plan shifted the risk of a fall in interest rate from Cigna to its employees.

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Loose Lips Sink Ships!

- The Supreme Court, although it remanded, appeared in dicta to approve the ultimate result of the district court but disagreed with how it got there.

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Stay Current: New Laws, Renewed Focus on "Old" Issues and "New" Technology

- **There is Always A New Law or New Enforcement Priorities**
- **Renewed Focus on Old Issues:**
  - Withdrawal liability
  - Retiree health cases
  - Attorney client privilege

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Which Areas Have Been in the Forefront Over the Past Year?

- Other major areas this year include:
  - Stock Drop Litigation
  - Excessive Fee Litigation
  - Standard of Review/Plan Interpretation Cases
  - Damages for Failure to Provide Information
  - What Is an ERISA Plan
  - Collections and Withdrawal Liability
  - ERISA Preemption
  - Plan Amendments
  - *Concerted Protected Activity*

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Supreme Court Hears Argument in First Stock-Drop Case

- Fifth Third Bancorp v. Dudenhoeffer, U.S., No. 12-751, argued 4/2/14
- Fifth Third Bancorp sponsored a 401(k) plan with 20 investment options. The plan provided that one of those options was the Fifth Third Stock Fund, which invested primarily in Fifth Third shares.
- The company matched up to the first 4% of employee contributions, placing matching funds in the Fifth Third Stock Fund. Employees could direct that those funds be moved to other investments.

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Supreme Court Hears Argument in First Stock-Drop Case, cont'd.

- Plaintiffs alleged that the company and the plan fiduciaries violated their fiduciary duties under ERISA by continuing to offer the Fifth Third Stock Fund, which suffered a 74% drop in the share price between 2007 and 2009 after the company changed, according to plaintiffs, from being "a conservative lender to a subprime lender".
- The district court dismissed, finding that the fiduciaries were entitled to a presumption of prudence in investing in employer stock, and that plaintiffs did not plead facts sufficient to find an abuse of discretion.

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Supreme Court Argument Focuses on "Inside Information"

- The Sixth Circuit reversed, finding that the presumption of prudence does not apply at the motion to dismiss stage. It also did not believe that ESOP fiduciaries should have a different standard applied to them.
- The questions by the U.S. Supreme Court justices appeared to suggest that they view as a key question just how a prudent fiduciary should respond to "inside information" which may affect the value of the stock.

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Supreme Court Argument Focuses on “Inside Information”

- The justices also had questions on whether ESOP fiduciaries could consider both the participant’s interests as investors and their interests as employees, in the event, for example that deciding to sell declining stock could increase the likelihood of the employer going bankrupt or having to lay off workers.

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  - Discrimination
  - Deceit

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Questions?

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ERISA UPDATE, Part 2: ACA Update

Prepared by
Katherine A. Hesse and Brian P. Fox

GLAS, GPSolo and ABA Standing Committee on Group and Prepaid Legal Services
Aria Resort and Casino, Las Vegas, Nevada

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Topics

- Federal HC Reform: What To Focus on Now
  - Pay or Play
  - Affordability
  - Notice and Reporting
  - Taxes and Fees

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Federal HCR Overview

- Effective as of the passage of the law:
  - Nursing Mothers Assistance
  - Small Business Tax Credit
  - Early Retiree Reinsurance Program ($5 billion)

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Federal HCR - Overview

- Effective for plan years beginning after September 23, 2010:
  - Insurers may not rescind coverage except in cases of fraud
  - Plans may not discriminate in favor of highly compensated employees (Delayed until regulations adopted)

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Federal HCR - Overview

- Employers or insurers must notify employees if they intend to remain a grandfathered plan
- Adult Children Covered up to age 26
- No lifetime limits on the dollar value of coverage for Essential Health Benefits; reasonable annual limits allowed
- No pre-existing condition restrictions for children under age 19

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Federal HCR - Overview

- For non-grandfathered plans, coverage of recommended prevention services with no cost sharing
- Expanded internal and external claims appeal process

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Federal HCR Overview - 2011

- 2011:
  - Restrictions on Flexible Spending Accounts ("FSA") and Health Savings Accounts ("HSA") being used to buy over the counter drugs unless there is a prescription
  - Wellness program grants available to certain smaller employers (**delayed until 2014**)
  - For tax year 2011 and subsequent tax years, employer must report the aggregate cost of employer-sponsored health benefits on W-2 forms (**delayed until 2012**)

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Federal HCR Timeline – 2012

- Summary of Benefits and Coverage (SBC) to be provided to participants by beginning of the next plan year beginning on or after September 23, 2012.
- Reporting aggregate cost of health care on W-2 for employers issuing 250 or more W-2 Forms.

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Federal HCR Timeline – 2013

- $2,500 cap on contributions to FSAs.
- Medicare tax increase for certain individuals.
- Notice of Insurance Exchanges provided to employees by October 1, 2013.
- PCORI fees.

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Federal HCR Timeline – 2014

- Individual Mandate goes into effect.
- 90 day limit on waiting periods for coverage.
- State based insurance exchanges operational and available for individuals and certain small businesses. (Beginning October, 2013)
- Prohibition on pre-existing condition restrictions for adults, as well as children.
- Prohibition on annual limits for Essential Health Benefits.

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Federal HCR Timeline – 2014 (Cont'd.)

- Pay or Play - Monetary penalties on employers who do not offer coverage or who have employees taking tax credits and employer reporting requirements. (**Delayed until 2015 or 2016**)
- Employer reporting requirements. (**Delayed until 2015**)
- Transitional Reinsurance Program and Health Insurance Tax

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Federal HCR Timeline – 2014 (Cont'd.)

- Increased small business tax credit.
- All health plans, except "grandfathered plans", must cover Essential Health Benefits.
- Automatic enrollment of employees in plans with the option to opt out (requirement has been pushed back until at least 2015 after regulations are issued).
- Wellness program grants available to certain smaller employers. (**delayed from 2011**)

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Federal HCR Timeline – 2017 and Beyond

- 2017:
  - States may choose to allow large employers to purchase insurance for employees through the state based health care exchanges.
- 2018:
  - "Cadillac" tax on high-cost health care plans.

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Medicare Tax

- Beginning January 1, 2013, the Medicare Part A tax on wages increased by 0.9% (from 1.45% to 2.35%) on earnings over $200,000 for individuals and over $250,000 for married couples filing jointly.
- Also, beginning January 1, 2013, Medicare taxes increased to 3.8% and expanded to cover both wage income and investment income tax on certain higher income individuals.

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Individual Penalty – Federal

- As of January 1, 2014, applicable individuals must maintain "minimum essential coverage" or pay a tax penalty.
- In 2014, the tax penalty will be $95 per person up to a maximum of three times that amount per family or 1% of household income, whichever is greater.
- In 2015, the penalty will be $325 per person up to a maximum of three times that amount per family or 2% of household income, whichever is greater.
- In 2016, the penalty will be $695 per person up to a maximum of three times that amount per family or 2.5% of household income, whichever is greater.

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Federal Pay or Play – Large Employers

- Effective January 1, **<u>2015</u>**, employers with 100 or more full time equivalent employees who do not offer minimum essential coverage (“MEC”) to at least 70% of full-time employees must pay $2,000 annually for each full-time employee above the first 30, so long as any one employee receives a tax credit.

- Beginning January 1, 2016, these employers must offer MEC to at least 95% of all full-timers.

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Federal Pay or Play – Large Employers

- The "pay or play" mandate has recently been delayed until January 1, **2016**, for employers with between 50 and 99 full-time equivalent employees.

- As of January 1, 2016, all employers with 50 or more full-time equivalent employees will be required to offer MEC to at least 95% of full-time employees or be subject to potential penalties.

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Federal Pay or Play - Employer Mandate

- Employers who offer MEC, but whose employees receive tax credits, would pay $3,000 for each worker receiving a tax credit up to an aggregate cap of $2,000 per full-time employee.

- Full-time employees are those who work an average of at least 30 or more hours per week or 130 or more hours per month.

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What Employers are Covered?

- To determine Applicable Large Employer status, count the employer's full-time employees (using a 30 hour per week standard) plus the result of dividing the hours of service (up to 120 per employee) of employees who are not full-time employees by 120 for each month.

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What Employers are Covered?

- Example: During each calendar month of 2014, an employer has 20 full-time employees who average 35 hours per week, and 40 part-time employees who average 90 hours per month
- Each of the 20 employees who average 35 hours per week count as one full-time employee

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What Employers are Covered?

- To determine full-time equivalent employees, take total hours of the part-time employees (up to 120 hours of service per employee) and divide by 120
  - In the example, the employer has 30 full-time equivalent employees each month ($40 \times 90 \div 120 = 30$)
- Result: Employer has 50 FTEs during each month in 2014 and is an ALE for 2015.

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Federal Pay or Play - Employer Mandate (Cont'd.)

- If an employer does not offer minimum essential coverage and one or more full time employees receive a premium tax credit, the penalty is $2,000 per full time employee with the first 30 full time employees excluded.
  - Example: an employer with 100 full time employees that does not offer minimum essential coverage would pay $140,000 (70 x $2,000).

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Federal Pay or Play - Employer Mandate (Cont'd.)

- If an employer offers minimum essential coverage, but one or more full time employees receive a premium tax credit, the penalty is $3,000 per employee who receives the premium credit with the maximum penalty not to exceed $2,000 per full time employee, excluding the first 30 full time employees.
  - Example: if an employer with 100 full time employees offers minimum essential coverage, but has 5 full time employees receive a credit, then employer would pay $15,000 (5 x $3,000). The maximum penalty for that employer would be $140,000 (70 x $2,000).

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Minimum Essential Coverage

- Includes employer plans, individual plans, government plans (Medicare, Medicaid, etc.).
- Plans must cover minimum value of at least 60% of actuarial value of covered benefits; individuals are allowed to apply for premium tax credits if employer coverage covers less than 60% of actuarial value.
- Deductible and cost sharing limits.
- Coverage must be affordable to employees.

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Essential Health Benefits

- The individual mandate of the ACA requires most individuals to be enrolled in a health plan that provides "essential health benefits" as of January 1, 2014.
- Statutorily mandated coverages (emergency, hospitalization, preventative, pediatric, etc.)
- Regulatory mandates - Benchmark Plans

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Federal Pay or Play – Affordability

- Affordability and, thus, eligibility for the premium tax credit, is based on the employee's household income, including the incomes of the employee's spouse and dependents.

- The cost of health care must not be more than 9.5% of the employee's household income in order to be considered affordable.

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Federal Pay or Play – Affordability

- Premium tax credits are available for U.S. citizens and legal immigrants who purchase insurance through an exchange and who have a household income of up to 400% of the Federal Poverty Level ("FPL").

- Not available if you qualify for public coverage: Medicaid, CHIP, Medicare, military coverage or an "affordable" employer plan.

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Federal Pay or Play – Affordability

- The premium assistance tax credit is based on:
  - The premium cost of the second-lowest-cost silver Exchange plan, and
  - The household income level of the individual:

Household Income Level (% above FPL)	Maximum Premium as Percentage of Income
Less than 133%	2.0%
At least 133% but less than 150%	3.0% – 4.0%
At least 150% but less than 200%	4.0% – 6.3%
At least 200% but less than 250%	6.3% – 8.05%
At least 250% but less than 300%	8.05% – 9.5%
At least 300% but less than 400%	9.5%

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Federal Pay or Play – Affordability

- 2013 Federal Poverty Guidelines:

Persons in Family	100% FPL	133% FPL	250% FPL	400% FPL
1	$11,490	$15,282	$28,725	$45,960
2	$15,510	$20,628	$38,775	$62,040
3	$19,530	$25,975	$48,825	$78,120
4	$23,550	$31,322	$58,875	$94,200
5	$27,570	$36,668	$68,925	$110,280
6	$31,590	$42,015	$78,975	$126,360
7	$35,610	$47,361	$89,025	$142,440
8	$39,630	$52,708	$99,075	$158,520

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Federal Pay or Play – Affordability

- Bureau of Labor Statistics Predicts that potentially more than 50% of U.S. households could qualify for subsidies

- Receipt of the subsidy by an employer's full time employee triggers play or pay penalty against employer

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Federal Pay or Play – Affordability

- The proposed regulations include a safe harbor for employers that would allow employers to look only at the employee's W-2 wages (Box 1) from the employer to determine affordability.

- If the premium cost of the employer's lowest cost plan that provides essential health benefits is less than 9.5% of the employee's W-2 wages, then the employer would not be subject to the penalty for that employee.

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Federal Pay or Play – Affordability

- Example: Employee makes $30,000 per year in W-2 wages. 9.5% of $30,000 is $2,850.

- If the employee portion of the lowest cost individual plan offered by the employer that covers minimum essential coverage is more than $2,850 annually (or $237.50 per month), then the employer would not fall within the safe harbor.

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Federal Pay or Play – Affordability

- Rate of Pay Safe Harbor:

  - Affordable if required monthly contribution does not exceed 9.5% of an amount equal to 130 hours multiplied by the employee's hourly rate of pay.

  - For salaried employees, monthly salary is used instead of 130 multiplied by the hourly rate of pay.

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Federal Pay or Play – Affordability

- Federal Poverty Line Safe Harbor:
  - Affordable if required monthly contribution does not exceed 9.5% of a monthly amount determined as the Federal poverty line (FPL) for a single individual for the applicable calendar year, divided by 12.
  - FPL is the FPL for the state in which employee is employed.

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90 Day Waiting Period

- Beginning in 2014, health care plans may not have a waiting period of more than 90 days for coverage.
- Recent guidance provides a safe harbor from the 90 day rule and the employer mandate in cases of variable hour or seasonal employees, if the employer follows a specified process in determining who should be offered health care.

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Federal Pay or Play – Look Back Option

- Optional method for determining full-time status.

- Key Terms:
  - "Measurement Period" (a/k/a/ “Look Back Period”)
  - "Standard Measurement Period“ - for ongoing employees
    - Ongoing employees have worked for the employer for at least one standard measurement period
  - “Initial Measurement Period” - for new employees
  - “Administrative Period”

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Federal Pay or Play – Look Back Option

- Key Terms (Cont'd):
  - Stability Period
  - Variable hour employee
  - Seasonal employee

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Federal Pay or Play – Look Back Option

- This option is especially important for employers with variable hour and seasonal employees.

- It allows employers a safe harbor measurement period where they legitimately do not know if an employee will work full-time hours for health care purposes during which health care does not have to be offered.

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Federal Pay or Play – Look Back Option

- The measuring period can be from 3 to 12 months long.
- After each measuring period there will be a stability period of the same length as the measurement period, but no shorter than 6 months.

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Federal Pay or Play – Look Back Option

- Employees found to be full time during the measuring period, must be offered health care for the entire stability period, as long as they continue to work for the employer.

  - Even if the employee works less than 30 hours per week during the stability period.

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Federal Pay or Play – Look Back Option

- Employers are allowed an administrative period of no more than 90 days after the measuring period and before the stability period.

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Employer Reporting Requirements

- Employers must annually report (first in 2016 for 2015):
  - whether they offer health coverage to their full-time employees and dependents,
  - the total number and names of full-time employees receiving health coverage,
  - the length of any waiting period, and
  - other information about the cost of the plan.
  - information on the waiting period and coverage to each employee annually.

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Notice of Exchanges

- Beginning March 1, 2013, employers were to have provided new and existing employees with information about insurance exchanges, including information on employee eligibility if the employer's coverage is not affordable and information on free choice vouchers and premium credits.

- Delayed in January, 2013. In early May, further guidance was released including a model notice.

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Notice of Exchanges

- The notice requirement applies to all employers covered under the Fair Labor Standards Act ("FLSA").

- Employers must provide the notice to all employees whether or not they are enrolled in the employer's health care plan and whether or not they are eligible for the employer's health care plan (full-time and part-time employees).

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Notice of Exchanges

- The model notices include all of the required information and a place for the employer to include information about its own coverage.

- Employers must adapt portions of the notice to meet their particular facts and circumstances, as well as providing information about the proper Marketplace.

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Notice of Exchanges

- Employers were required to provide the notice to current employees no later than October 1, 2013.
- Notices must be provided to new employees hired on or after October 1, 2013, at the time of hiring. DOL has indicated that, for 2014, it will consider notice to new employees to be timely if provided within 14 days of the employee's start date.

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Notice of Exchanges

- In late September, 2013, DOL issued an FAQ stating that there is no fine or penalty for failing to provide the notice of the exchange.

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Wellness Incentives

- The PPACA contained provisions creating incentives to have employer sponsored wellness programs.
- Final regulations have been released that build on rules already in place to promote these programs and protect consumers.

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Wellness Incentives

- Participants in health-contingent wellness programs would be able to see premiums reduced by up to 30%, instead of up to 20% as allowed currently.

- The maximum reward could be up to 50% of the premium, if the program is intended to prevent or reduce tobacco use.

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Wellness Incentives

- The final regulations also include provisions regarding the design of health-contingent wellness programs intended to prevent discrimination and allow all participants to achieve the rewards.

- The new wellness rules are scheduled to be effective for plan years beginning on or after January 1, 2014.

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Comparative Effectiveness Research or PCORI Fee

- Fee on self insured plans and on insurers offering insured plans.
- The fee goes to the Patient-Centered Outcomes Research Institute (PCORI) Trust Fund to collect and disseminate comparative clinical effectiveness research.
- Applies to plan years ending on or after Oct. 1, 2012 and before Oct. 1, 2019.

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Comparative Effectiveness Research or PCORI Fee

- The fee is $1 per covered life for plan years ending before Oct. 1, 2013 and $2 per covered life for plan years ending on or after that date.

- The fee is based on the average number of covered lives in the plan.

- An separate HRA is a self-funded health care plan.

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Transitional Reinsurance Program

- Requires a contribution for three years (2014-2016).
- Purpose is to stabilize premiums in the individual market for those with pre-existing conditions.
- The contribution is paid by sponsors of self insured plans and insurers of fully insured group health plans.

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Transitional Reinsurance Program

- The contribution is based on the average number of covered lives in the plan.
- $25 billion is to be collected over three years, including $5 billion to pay the IRS for the ERRP payments.
- The estimated fee will be $63 per year per covered life in 2014 and less than that in 2015 and 2016.

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Health Insurance Tax

- Starting in 2014, PPACA imposes a health insurance tax (HIT) on the fully-insured market (includes medical, dental and vision).
- $8 billion in 2014, $11.3 billion in 2015-2016, $13.9 billion in 2017, and $14.3 billion in 2018.
- HIT obligation is divided among insurers according to a formula based on each insurer's net premiums.
- Businesses that drop coverage or switch from fully-insured to self-insured—increase HIT obligation to those remaining fully-insured.

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Checklist

- Work with your insurer/broker and legal counsel to ensure that your Summary of Benefits and Coverage was prepared and provided correctly and timely.
- Provide the cost of health insurance on W-2 forms for tax year 2012 and beyond. (250+ W-2s only)
- Ensure you have in place a $2,500 spending cap for your FSA for the next plan year beginning on or after January 1, 2013.
- Provide Notice of Exchanges to new employees.

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Checklist (Cont'd.)

- Self insured plan sponsors should ensure they provide minimum essential value and coverage of essential health benefits in their plans.
- Insured plan sponsors should work with insurers to ensure their plans provide minimum essential value and coverage of essential health benefits.
- Self insured plans should be prepared to pay the Comparative Effectiveness Research Fee and the Transitional Reinsurance Program Contribution.

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Checklist (Cont'd.)

- Deduct the increased Medicare Tax for certain higher income employees beginning January 1, 2013.
- Consult with legal counsel, brokers and insurers to make sure you will be compliant with the 90 day waiting period rule by 2014.
- Determine whether your insurance is "affordable" for your employees under the federal law in advance of 2015 or 2016, depending on the size of your workforce.

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Checklist (Cont'd.)

- Document information needed for employers reporting requirements.
- Be on the lookout for further guidance from state and federal governments.

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